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IMPOSSIBLE FOODS INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IMPOSSIBLE FOODS INC., a Delaware
corporation,

Plaintiff/Counter-Defendant,

v.

IMPOSSIBLE LLC, a Texas limited liability
company, and JOEL RUNYON,

Defendants/Counter-Plaintiffs.

Case No. 5:21-cv-02419-BLF (SVK)

**MOTION TO STRIKE
DEFENDANTS/COUNTER-PLAINTIFFS'
AFFIRMATIVE DEFENSES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Judge: Hon. Beth Labson Freeman
Date: June 26, 2025
Time: 9:00 a.m.

NOTICE OF MOTION

TO DEFENDANTS/COUNTER-PLAINTIFFS IMPOSSIBLE LLC AND JOEL
RUNYON AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 26, 2025, before the Honorable Beth Labson
Freeman, Courtroom 3, 5th floor, San Jose Courthouse, 280 South 1st Street, San Jose,

PLAINTIFF/COUNTER-DEFENDANT IMPOSSIBLE FOODS INC.'S MOTION TO STRIKE
CASE NO. 5:21-CV-02419-BLF (SVK)

1 California 95113, at 9:00 a.m. or as soon thereafter as the matter may be heard,
 2 Plaintiff/Counter-Defendant Impossible Foods Inc. (“Impossible Foods”) will and hereby does
 3 move to strike Defendants/Counter-Plaintiffs Impossible LLC’s and Joel Runyon’s
 4 (collectively, “Defendants”) select affirmative defenses asserted in Defendants’ Answer and
 5 Counterclaims to Impossible Foods’s Third Amended Complaint [Corrected]. ECF 171 at 48-
 6 49. Impossible Foods moves to strike the affirmative defenses of unclean hands, estoppel,
 7 waiver, and acquiescence pursuant to Federal Rules of Civil Procedure 12(f) and Local Rule
 8 10-1.

9 Impossible Foods’s motion is based on this Notice of Motion and accompanying
 10 Memorandum and Points of Authorities in Support, the pleadings and papers on file in this
 11 action, and such other written or oral argument as may be presented at or before the time this
 12 motion is heard and/or taken under submission by the Court.

13
 14 DATED: April 9, 2025

Respectfully submitted,

15 **KILPATRICK TOWNSEND & STOCKTON**

16 By: /s/ H. Forrest Flemming, III

17 R. Charles Henn Jr. (*pro hac vice*)
 18 H. Forrest Flemming, III (*pro hac vice*)
 Erica C. Chanin (*pro hac vice*)
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19 *Attorneys for Plaintiff/Counter-Defendant*
 20 IMPOSSIBLE FOODS INC.

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 28 PLAINTIFF/COUNTER-DEFENDANT IMPOSSIBLE FOODS INC.’S MOTION TO STRIKE
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1 **I. INTRODUCTION**

2 Defendants' March 31, 2025 Answer (ECF 168) asserted several affirmative defenses
 3 for the first time without leave of Court, which was the subject of Impossible Foods's prior
 4 motion to strike (ECF 170). On April 4, Defendants filed an "Answer and Revised
 5 Counterclaims to [Impossible Foods's] Third Amended Complaint [Corrected]," in which they
 6 clarified that the new defenses applied exclusively to the new allegations and claims in the
 7 Third Amended Complaint. ECF 171 at 48. Nonetheless, and as explained in Impossible
 8 Foods's prior motion to strike, those defenses are not adequately pled. In particular, Defendants
 9 did not allege *any* facts in support of their new defenses of waiver, estoppel, acquiescence, and
 10 unclean hands ("Defenses"), meaning they fail the pleading standards established after *Bell Atl.*
 11 *Corp v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

12 Defendants raised the Defenses for the first time on March 31, after the last day to serve
 13 written discovery requests. Now, with just two business days left in fact discovery, Defendants
 14 still have not alleged any facts supporting the Defenses. Allowing these pure boilerplate
 15 defenses to proceed at this juncture would irreparably prejudice Impossible Foods, which has
 16 been denied the opportunity to (1) conduct discovery into the Defenses and (2) locate and
 17 produce evidence to defeat the Defenses.

18 For these reasons and those provided below, the Court should strike the Defenses
 19 without leave to amend.

20 **II. ARGUMENT**

21 The Court should strike the Defenses under Rule 12(f) because, despite Impossible Foods
 22 advising Defendants of this deficiency, Defendants' "corrected" answer contains zero factual
 23 allegations in support of the Defenses, in violation of *Twombly*, *Iqbal*, and their progeny. *Ochoa*
 24 *v. City of San Jose*, Case No. 21-cv-02456-BLF, 2022 WL 1619152, at *2 (N.D. Cal. May 23,
 25 2022) (Freeman, J.) ("Courts generally apply the *Twombly/Iqbal* plausibility standard to pleading
 26 affirmative defenses[.]").

27 "Just as a plaintiff's complaint must allege enough supporting facts to nudge a legal

1 claim across the line separating plausibility from mere possibility, a defendant's pleading of
2 affirmative defenses must put a plaintiff on notice of the underlying factual bases of the
3 defense." *Hernandez v. Cnty. of Monterey*, 306 F.R.D. 279, 284 (N.D. Cal. 2015) (citations
4 omitted). Where, as here, defenses "are supported by no factual allegations," courts "regularly"
5 strike them. *Ochoa*, 2022 WL 1619152, at *2. Thus, the Defenses should be stricken under
6 *Twombly*.

7 The lack of plausibility and lack of fair notice provided by the Defenses is particularly
8 apparent when considering the legal doctrines underlying them. Beginning with "estoppel," the
9 law recognizes numerous types of estoppel: e.g., collateral estoppel, judicial estoppel, licensee
10 estoppel, equitable estoppel, contract estoppel, estoppel by laches. Impossible Foods has no
11 way of knowing what type(s) of estoppel Defendants are even asserting, not to mention the
12 facts that purportedly support each element.

13 To assert an affirmative defense of waiver, Defendants must allege facts that would
14 plausibly establish that Impossible Foods intentionally relinquished or abandoned a known
15 right. *See Finjan, Inc. v. Bitdefender Inc.*, Case No. 17-cv-04790-HSG, 2018 WL 1811979, at
16 *4 (N.D. Cal. Apr. 17, 2018) ("A party asserting a waiver defense must allege that a plaintiff
17 intentionally relinquished or abandoned a known right."). Here, Defendants do not identify any
18 "right" purportedly waived, any knowledge of that right on the part of Impossible Foods, nor
19 any act or omission plausibly constituting an intentional relinquishment of that right. *See G &*
20 *G Closed Cir. Events, LLC v. Nguyen*, No. 10-CV-168-LHK, 2010 WL 3749284, at *3 (N.D.
21 Cal. Sept. 23, 2010) (striking an affirmative defense of waiver as "insufficient because [it]
22 amounts to the bare statement of a legal doctrine lacking any articulated connection to the
23 claims in this case").

24 To assert an affirmative defense of acquiescence, Defendants must allege facts
25 plausibly showing that (a) Impossible Foods "actively represented that it would not assert a
26 right or claim," (b) the delay between that representation and assertion of the right was not
27 excusable, and (c) the delay caused Defendants undue prejudice. *Seller Agency Council, Inc. v.*

1 *Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 989 (9th Cir. 2010). Defendants’
 2 *laches* defense (barely) discusses delay and prejudice, but nowhere in Defendants’ pleading is
 3 an allegation that Impossible Foods “actively represented” that it would not assert the new
 4 claims of fraud on the United States Patent & Trademark Office (“PTO”) and trademark
 5 abandonment.

6 To assert an affirmative defense of unclean hands, “the defendant must demonstrate that
 7 the plaintiff’s conduct is inequitable and that the conduct relates to the subject matter of its
 8 claims.” *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th Cir. 1997) (citations omitted).
 9 Defendants’ unclean hands defense fails for at least three reasons. **First**, Defendants “fail[] to
 10 identify any conduct” that would provide grounds for an unclean hands defense. *Espitia v.*
 11 *Mezzetti Financial Services, Inc.*, Case No. 18-cv-2480-VKD, 2019 WL 359422, at *3 (N.D.
 12 Cal. Jan. 29, 2019). **Second**, unclean hands is a defense to trademark infringement, yet
 13 Defendants are attempting to use it as a defense to fraud on the PTO and trademark abandonment
 14 claims. Impossible Foods is not aware of any case in which the doctrine of unclean hands was
 15 applied to such claims. **Third**, the defense of unclean hands sounds in fraud, such that the
 16 heightened pleading standard that applies to fraud claims applies to the defense of unclean
 17 hands. *See Intel Corp. v. Hyundai Elecs. Am., Inc.*, 692 F. Supp. 1113, 1117 (N.D. Cal. 1987)
 18 (noting because the “defense of unclean hands involved elements of fraud,” “the standards of
 19 pleading should be identical” (citations omitted)). Defendants cannot even meet the standards of
 20 *Twombly*, much less the heightened pleading standards for fraud.

21 Finally, Impossible Foods is not required to demonstrate prejudice to support its motion
 22 to strike Defendants’ Defenses as insufficient under Fed. R. Civ. P. 12(f). *Ochoa*, 2022 WL
 23 1619152, at *3 (“[A] showing of prejudice is unnecessary for a motion to strike”). But
 24 Defendants will likely argue that Impossible Foods is not prejudiced by the Defenses because
 25 Impossible Foods could have questioned Defendants’ 30(b)(6) witness about them during his
 26 April 10 deposition. That anticipated argument misses the point. Each of the Defenses centers on
 27 conduct by *Plaintiff*, not Defendants. Thus, to combat the Defenses, Impossible Foods would

1 need to locate and produce evidence (either testimony or documents) related to Impossible
 2 Foods's challenged conduct. Fact discovery closes on April 14. Even if Defendants' witness
 3 explained in great detail the contours of the Defenses on April 10, Impossible Foods would not
 4 have had time to adduce evidence to rebut Defendants' allegations.

5 Defendants are represented by sophisticated counsel and were fully aware of their
 6 obligation to provide factual support for the Defenses in their March 31 pleading. And in its
 7 April 4 motion to strike, Impossible Foods put Defendants on further notice of that obligation.
 8 Defendants' unexplained failure to provide any factual allegations in support of the Defenses has
 9 therefore prejudiced Impossible Foods, and that prejudice cannot be remedied. Accordingly, the
 10 Court should strike the Defenses *without* leave to amend.

11 **III. CONCLUSION**

12 For the foregoing reasons, Impossible Foods respectfully requests that the Court strike
 13 Defendants' unclean hands, estoppel, acquiescence, and waiver affirmative defenses without
 14 leave to amend.

15
 16 DATED: April 9, 2025

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON

18 By: /s/ H. Forrest Flemming, III
 19 R. Charles Henn Jr. (*pro hac vice*)
 20 H. Forrest Flemming, III (*pro hac vice*)
 Erica Chanin (*pro hac vice*)
 Kollin Zimmerman (SBN 273092)
 21 *Attorneys for Plaintiff/Counter-Defendant*
 22 IMPOSSIBLE FOODS INC.

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2025, the foregoing document was filed electronically using the Court's CM/ECF system, which will send notification of such filing to counsel of record.

/s/ H. Forrest Flemming, III
H. Forrest Flemming, III

PLAINTIFF/COUNTER-DEFENDANT IMPOSSIBLE FOODS INC.'S MOTION TO STRIKE
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